

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

To be argued by:
Dante M. Scaccia
Estimated Time: 10 minutes.

Docket No. 77-1129

In The
United States Court of Appeals
For the Second Circuit

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UNITED STATES OF AMERICA,

Plaintiff-Appellant,

— v. —

RAYMOND D. MASCIARELLI
and
LAWRENCE SCHULTZ,

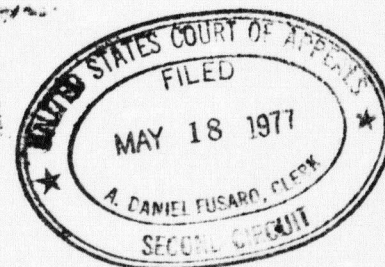
Defendants-Appellees.

On Appeal from the United States District Court
Northern District of New York

BRIEF FOR THE APPELLEE MASCIARELLI

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United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellant,

-v.-

RAYMOND D. MASCIARELLI
and
LAWRENCE SCHULTZ,

Defendants-Appellees.

BRIEF FOR THE APPELLEE MASCIARELLI

PRELIMINARY STATEMENT

Appellant appeals from an order of the Honorable Edmund Port, United States District Judge for the Northern District of New York, granting appellees' motion to dismiss the indictment for the government's violation of the wiretap provisions of the Omnibus Crime Control and Safe Streets Act of 1968 by its failure to comply with Title 18, United States Code, Section 2517(5).

ISSUES PRESENTED

Whether the postauthorization provisions of Title 18, United States Code, Section 2517(5) constitutes such a significant and legitimate Congressional concern that dismissal of the indictment is required in this case - especially in view of the actions of the Government manifesting a total disregard of the need for obtaining a subsequent order as required by the statute.

STATEMENT OF THE CASE

Raymond D. Masciarelli, defendant appellee, and another person were accused in a one-count indictment of the substantive offense concerning violation of the statute prohibiting the transmission of wagers and wagering information in interstate commerce. The indictment was supported by electronic surveillance materials which were acquired pursuant to several wiretap orders covering a period from March 7, to May 13, 1974. At an argument hearing on the appellees' motion to dismiss the indictment, the Honorable Edmund Port ruled that the government had failed to comply with the subsequent order requirements of Title 18, United States Code, Section 2517(5). Judge Port construed Section 2517(5) by holding that where a wiretap authorization permitted the government to intercept communications concerning violation of the statute prohibiting the operation of an illegal gambling business in interstate commerce, but the government used that wiretap to gather information concerning violation of the statute prohibiting the transmission of wagers and wagering information in interstate commerce, and did not seek court authorization for use of that information at any time and after presenting the information to a grand jury which returned an indictment against the defendants, the government had violated the statute restricting the use of intercepted communications and dismissed the indictment. The United States of America appeals from this order.

At the hearing, counsel for both sides stipulated that

the facts apply to both defendants; that the evidence related to both Section 1084 and 1955 violations; that the indictments in 75 CR 144 as well as 74 CR 142 were returned on the same day by the same grand jury; that the only reference in the papers submitted to Judge Port as to the Section 1084 violation was contained in paragraph six (6) in the fifth day report which accompanied M.P. 16; finally the government conceded that Brodson is indistinguishable from the instant case. (A. 20-27). On April 11, 1974, the Honorable Edmund Port issued the second in a series of three wiretap orders (designated as M.P.-16), authorizing agents of the Federal Bureau of Investigation to install a wiretap on telephone number 607-724-5301 located at 229 Chenango Street, Binghamton, New York. Judge Port found that there was probable cause to believe that defendant Masciarelli, and other named persons, were using the specified telephone to conduct an illegal gambling business and conspiracy to do so, in violation of Title 18, United States Code, Sections 1955 and 371, respectively (A. 113). During the course of this wiretap which was conducted April 11 through April 25, 1974, the government overheard one particular conversation upon which it rests its case (A. 121-122).

Evidence obtained from all of the wiretaps, including the interstate telephone call between the defendants Masciarelli and Schultz, which was a 1084 violation, was presented to the same grand jury that heard evidence relating to the Section 1955 violation (A. 20-23). The government at no time made any application to any Judge for an order authorizing the disclosure or the

use of such evidence to this date.

The evidence was submitted to the grand jury which returned indictment 77 CR 142 against the defendants Masciarelli and others relating to the illegal gambling business in violation of Title 18, United States Code, Section 1955 and a conspiracy to do so in violation of Title 18, United States Code, Section 371. On the same date, ie. November 18, 1974, the same grand jury indicted Masciarelli and Schultz for violating Title 18, United States Code, Section 1084 in indictment number 74 CR 144. (A. 8-9).

It was stipulated that the evidence obtained pursuant to the Title 18, United States Code, Section 1955 authorization related to both a Title 18, United States Code, Section 1955 as well as Section 1084 violation and that the same grand jury had presented to it evidence relating to both violations. (A. 21).

The appellees Masciarelli and Schultz both moved to dismiss the indictment and to suppress the illegal wiretap evidence on the authority of United States v. Brodson, 528 F. 2d 214 (7th Cir. 1975) and United States v. Marion, 535 F. 2d 697 (2nd Cir. 1976). (A. 11-14). In dismissing the indictment, Judge Port stated that

"The basis on which the dismissal is sought, and it is conceded as a fact by the Government, that the indictment in question was found by the Grand Jury as a result of the disclosure to them of information obtained pursuant to my wiretap order identified as M.P. 16. It further appears without dispute that M.P. 16 was issued by me on an application of the Government setting forth probable cause to believe the commission by the named subjects of offenses other than a violation of Section 18, 1084, namely, violations of Title 18, 1955, and conspiracy to violate that statute, a violation of Title 18, United States Code, Section 371. So that the factual situation is not in dispute at all. But

in substance, a wiretap order was granted to obtain evidence concerning the commission of one offense, evidence is obtained of another offense, although it would also be evidence of the offense for which the wiretap was submitted or ordered, and that evidence is used to obtain an indictment of a non-related offense. . . ". (A.38, 39).

ARGUMENT

DISMISSAL OF THE INDICTMENT WAS JUSTIFIED DUE TO THE GOVERNMENT'S NON-COMPLIANCE WITH STATUTORY DIRECTIVES

The government contends that Judge Port's order dismissing the indictment was improper, in that the government had substantially fulfilled the purposes of Section 2517(5). As in United States v. Brodson, 528 F. 2d 214 (1975), this appeal questions the validity of the dismissal of Appellee-Masciarelli's indictment as the appropriate remedy for the Government's violation in this case of one of the wiretap provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2517(5). Section 2517(5) restricts the use of intercepted wire or oral communications concerning criminal activities not specified by the order of authorization or approval for the original wiretap. Unless a judge of competent jurisdiction finds upon timely and appropriate application by the Government, that the contents of the communications were otherwise intercepted in accordance with the wiretap statutes, the intercepted communications may not be used or disclosed. As stated by Justice White in United States v. Giordano, 416 U.S. 505, 515 (1974), the legislative purposes behind Title III are difficult to discern. Yet the distinct sections of the Act are an integrated document and must be read as

such. The concepts of judicial supervision and the instillation of public confidence in the law enforcement process are enunciated purposes which characterized the lawmaking sessions of Title III.

The Senate Reports indicate Title III's generalized purposes to be: (1.) Protecting the privacy of wire and oral communications and (2.) Delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. 1968 U.S. Code Cong. and Adm. News 2112, 2153.

The appellee, Raymond D. Masciarelli, and another, were charged with the transmission of wagers and wagering information in interstate commerce in violation of 18 U.S.C. § 1084. The evidence for that indictment was obtained through the interception of telephone conversations under an order that only authorized interceptions covering violations of 18 U.S.C. § 1955. Section 1955 prohibits the operation of an illegal gambling business in interstate commerce. The Government's application under § 2517(5) was not filed in this case to date, and some twenty-eight months after the indictment was returned by the Grand Jury that considered the intercepted conversations. Consequently the district court dismissed the indictment.

On this appeal, the Government contends that the identical intercepted conversations which related to the Section 1955 violations also related to the Section 1084 violations. Thus, in the Government's view, it was not necessary to secure the court's approval to divulge

the Section 1084 conversations to the Grand Jury since they were appropriately intercepted under the Section 1955 authorization. Further, the Government contends that the indictment was sufficient on its face and that the only available remedy for any possible Section 2517(5) violation would be the suppression of the conversations when offered at the trial on the merits. Finally, the Government claims that there was no Section 2517(5) violation because a grand jury hearing is not a proceeding within the meaning of Section 2517(5).

There is no merit in any of these contentions. By inserting Section 2517(5) into the Act, the Congress obviously intended to require that the Government submit the tape of its wiretaps to a neutral judge so that he might determine whether the interceptions were the inadvertent product of a legitimately obtained wiretap or the electronic equivalent of the type of illegal evidence formerly obtained under the supposed authorization of a "general search warrant." Here, the Government's claim, that the authorizations applicable to the Section 1955 violations were also relevant to Section 1084 violations, should have been tested by submitting them to a judge in accordance with the rationale of Section 2517(5). This the Government failed to do within the time requirement of "as soon as practicable" that the Section specifies. Moreover, without submitting to the requirements of Section 2517(5), the Government disclosed the intercepted conversations to the Grand Jury.

Congress in Title III of the Omnibus Crime Control and Safe Streets Act prohibited the interception and disclosure of wire or oral communications, including the introduction into evidence

of the same "in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision would be in violation of this chapter." 18 U.S.C. §2517 (emphasis supplied). However, believing that the interception and disclosure of wire or oral communications was in the public interest in a limited and highly restricted category of crimes, the Congress created a specific exception to this outright prohibition. It authorized the Attorney General of the United States, or any Assistant Attorney General specially designated by him, to make application to a Federal judge of competent jurisdiction for an order authorizing the interception of wire or oral communications by named government agencies where such interception may provide evidence of violations of certain specified crimes named in the Act. 18 U.S.C. §2516. In the succeeding Section 2517 it authorized the disclosure and use of such interceptions in evidence, save and except where the intercepted communication relates to offenses other than those specified in the original order. In these latter situations, a second application was required to be made to a judge of competent jurisdiction for permission to disclose such evidence of other offenses. In the second application, the good faith of the original application would thus be tested.

The Government says that it was not obliged to make the application under Section 2517(5) because the evidence secured under the Section 1955 order and authorization and used in that prosecution

applied equally as well to the Section 1084 prosecution. This is of no consequence here because the two offenses are wholly separate and distinct; they involve dissimilar elements and require different evidence, even though some of it might overlap because both concern illegal gambling. The controlling factor here, however, is not the dissimilarity of the offenses, but the fact that the Government itself has violated the key provision of the legislative scheme of Section 2515, in that it did not comply with the mandate of Section 2517(5). The Act in Section 2515 condemned all wire or oral interceptions and prohibited their use in evidence where their disclosure was "in violation of this Chapter". Any exceptions from this broad language must be strictly construed in order to carry out the purpose of the Congress and make certain that the privacy of the individual is protected as so provided. Therefore, it was the duty of the Government to present the evidence it obtained under the Section 1955 authorization to the trial judge for him to determine whether it was admissible and was sufficient to meet the burden of the prosecution under Section 1084.

Dismissal of an indictment is the ultimate sanction for the Government's failure to act properly. That drastic remedy has been approved in at least five other circuits in cases involving challenged Grand Jury evidence: Jones v. United States, 119 U.S. App. D.C. 284, 342 F. 3d 863, 873 (1964); United States v. Tane, 329 F. 2d 848, 853 (2d Cir. 1964); Truchinski v. United States, 393 F. 2d 627, 632 (8th Cir. 1968); United States v. Thompson, 493 F. 2d 305, 308-309 (9th Cir. 1974); United States v. Johnson, 463 F. 2d 70, 73 (10th Cir. 1972).

In addition, Judge Campbell found dismissal justified in a wiretap context in United States v. Guglielmo, 245 F. Supp. 534 (N.D. III 1965), and was affirmed by United States v. Dote, 371 F. 2d 176, 178 (7th Cir. 1966). Moreover, the Supreme Court has itself recognized "the stringent conditions" imposed by Congress on the interception of private wire and oral communications. Those restrictions not only limit the interceptions to specified serious crimes where prior judicial approval has been secured, but they further underscore that all interceptions are outlawed except where "expressly authorized in Title III". Indeed, unauthorized interceptions and the disclosure and use of information obtained through them are denounced as crimes. Gelbard v. United States, 408 U.S. 41, 46, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972). Gelbard, unlike the instant case, involved a grand jury witness, not the dismissal of indictment of a defendant in a criminal prosecution. Nevertheless, its outline of the overall policy of Title III and the strictures that it imposes are relevant here. We emphasize that here the fault lies not with the Grand Jury, for it did as it was told by the prosecutor, but with the prosecution itself for not complying with Section 2517(5).

In a recent Second Circuit opinion, Chief Judge Kaufman reaffirmed a strict interpretation of statutory language relating to the judicial regulations of eavesdropping intrusions. The opinion stated that:

"Strict compliance with the requirements of Section 2517(5) and other strictures imposed by Title III is no less essential...

Congress carefully circumscribed utilization of the occasionally useful but potentially dangerous law enforcement tools of electronic surveillance in an effort to comply with the Fourth Amendment and to "protect effectively the privacy of wire and oral communications (and) the integrity of court and administrative proceedings" Pub. L90-351, Title III, 201. To ignore or gloss over these restrictions, or view them as mere technicalities to be read in such a fashion as to render them nugatory, then is to place in peril our cherished personal liberties. United States v. Marion, F. 2d, page 3584, Slip Op. 794, Docket No. 75-1408 (2d Cir. May 7, 1976).

This opinion involved the construction of 18 U.S.C. §2517(5), a statutory stricture requiring subsequent judicial approval for the incidental interception of offenses other than those specified in the initial authorization. The Government argued that judicial approval was necessary only where the intercepted communication was totally unrelated to the previously specified offense. The panel rejected this qualification of a Congressional mandate and declined to redraft the statute to excuse the fact that the Government had violated a key provision of the legislative scheme of Title III -- one which related to the supervisory function of the courts over the use and employment of electronic surveillance.

II. THE FAILURE TO OBTAIN AN ORDER
AUTHORIZING DISCLOSURE TO THE
GRAND JURY WARRANTS SUPPRESSION
OF ALL OF THE EVIDENCE.

Given Judge Port's decision that the evidence relating to the Section 1084 violation was improperly disclosed to the same

grand jury which had presented to it evidence relating to the Section 1955 violation and given the government's action in making the Section 1955 indictment (74 CR 142) a part of this record (74 CR 144) which relates to the Section 1084 violation it is abundantly clear that the counts in the two indictments could and should have been properly included in one indictment or in the alternative the two indictments are so inextricably intertwined that they should be considered together as a matter of law by this court.

Furthermore an interlocutory appeal relating to both indictments has been previously considered by this court, sub nom. United States v. Cannone, Docket No. 75-1201. Since Judge Port has dismissed the indictment in 74 CR 144 this court should affirm the order of dismissal and also order the dismissal of the indictment in 74 CR 142, on the ground that the indictment 74 CR 142 was obtained on the basis of information unlawfully obtained. Wong Sun v. United States, 371 U.S. 471, 491-92, (1963); United States v. Wright, 524 F.2d 1100, 1102 (2d Cir. 1975).

The government seems to misplace reliance on the recent Supreme Court decision United States v. Donovan which held simply that the failure to notify a party, who was not named in the order, in timely fashion does not require suppression. In clarifying the Second Circuit's understanding of Donovan Judge Gurfein set forth the lack of clarity of the decision of the Supreme Court in Donovan.

The opinion stated that:

"The decision of the Supreme Court in Donovan has not given us an altogether clear answer, however. That case involved the failure to give notice to two persons whose conversations had been overheard but who had not been "named" in the order. In such case, it is discretionary with the judge whether to give them notice. 18 U.S.C. §2518(8)(d). The Court of Appeals ordered suppression of the conversations based upon its reading of Giordano, supra. There, as we have noted, the Court decided that authorization by the Attorney General or an Assistant Attorney was essential, on the ground that, based upon the legislative history, such authorization played "a central role in the statutory scheme." 416 U.S. at 528. In Donovan, the Court surveyed the structure of the Act and its legislative history and concluded that "we do not think that postintercept notice was intended to serve as an independent restraint on resort to the wiretap procedure." United States v. Donovan, _____ U.S. _____, 45 U.S.L.W. at 4122. We must acknowledge that the actual holding of Donovan relates to the class of persons required to be given "discretionary notice" pursuant to 18 U.S.C. §2518(8)(d), but we think that the reasoning of the Court confirms the view which we expressed in Rizzo and Principe, supra, that prejudice must also be shown when the notice is said to be "mandatory" within the ninety day notice requirement, we again hold that a failure strictly to observe the time limitation puts the burden on the defendant to show that he was prejudiced. See Donovan, supra, _____ U.S. _____, 45 U.S.L.W. at 4122 n.26. United States v. Fury, et ano. F2d, pages 3205-06, Slip Op. 738, 716, Docket Nos. 76-1506, 76-1512, April 27, 1977.

Contrary to the Government's contention (G.Br. 23), Judge Port made an explicit finding that the five day report did not constitute the application for an order required by 18 U.S.C. §2715(5) (A. 41, 42).

CONCLUSION

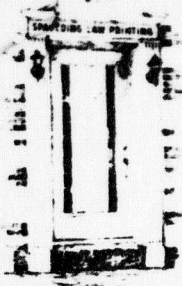
The order of dismissal of the indictment in 74 CR 144 should be affirmed and in exercise of its supervisory power this court should order a dismissal of the related indictment in 74 CR 142.

Respectfully submitted,

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~~XXXXXXXXXX~~ Docket No. 77-1129

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cc: **Dante M. Scaccia, Esq.**